

# RESPONSE TO INTERVENTION: A RISING TIDE OR LEAKY BOAT?

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## INTRODUCTION

Will a rising tide lift all boats? Calls for reform of special education have begun to focus on ways in which it might merge more with general education, with the suggestion that bringing special education into the mainstream may benefit all students, not just those with disabilities.<sup>1</sup> This Article looks at the legal support for and growth of an educational methodology called Response to Intervention (RTI) that bridges general education and special education. RTI's use spread after it was included in the 2004 reauthorization of the Individuals with Disabilities Education Act (IDEA), and it has the potential to impact how educational services are provided, not just to children with disabilities, but also to other children who are falling behind in school because they are not receiving appropriately targeted educational services.<sup>2</sup>

In particular, RTI may offer a way to provide more effective educational services to our nation's growing body of English Language Learners (ELLs), who are at particular risk for being misidentified as having learning disabilities. Yet RTI is not without its critics. In particular, many special education advocates fear that RTI unnecessarily delays students' access to needed special education services. This problem is compounded for ELLs. While students in need of special education can challenge RTI programs under the IDEA, ELLs—at least those who do not need full-blown special education—do not have that option. Instead, these ELLs only have access to the same set of state and federal laws and regulations that have long failed to effectively protect their educational rights.

This Article proposes a way to reduce this discrepancy that can be adopted at the local level, rather than relying on state or federal legislative changes. In particular, it argues that individual schools should expand the *procedural* rights available to students receiving RTI services by extending to them the alternative dispute resolution procedures currently available only to students seeking special education services. By allowing schools to

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<sup>1</sup> See, e.g., Karen Syma Czapanskiy, *Special Kids, Special Parents, Special Education*, 47 U. MICH. J.L. REFORM 733 (2014); Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071 (2005).

<sup>2</sup> 20 U.S.C. § 1400 (2012). See discussion *infra* Part I.B.

leverage mediators already trained to resolve RTI-related disputes, this solution would provide a way to improve individual tailoring of educational services and address parental concerns at relatively low cost. Such a solution would be good for schools, students, and parents—even in the absence of additional substantive legal rights.

Part I of this Article discusses what RTI is and how it has been incorporated into the IDEA. Part II examines the promise of RTI and common criticisms of it, focusing on legal claims challenging RTI and the significantly different legal rights provided to special education and non-special education students receiving RTI. Finally, Part III discusses in more detail the alternative dispute resolution procedures required under the IDEA and argues that extending those procedures to all students receiving RTI, not just those with disabilities, would have significant benefits for all parties.

## I. THE RISE OF RESPONSE TO INTERVENTION

RTI as an educational methodology has been around for decades. It is a somewhat nebulous concept, however, and the idea of RTI has continued to evolve in the decade since the IDEA's amendments brought it into the national spotlight. Federal law and its implementing regulations contain no specific requirements as to what must be included in an RTI program, so RTI can and does look very different from jurisdiction to jurisdiction.<sup>3</sup> In this Part, I discuss what the education community means by “Response to Intervention” and how federal law encourages, funds, and (to a limited extent) defines the scope of RTI programs.

### *A. How Educators Define “Response to Intervention”*

RTI is an educational model designed to address learning *difficulties* in individual children.<sup>4</sup> RTI models vary widely in their specifics from state to state and school district to school district, but they share a focus on a few key principles: educational interventions that increase in intensity based on student needs; monitoring of student progress; opportunities for students to respond to the instruction; and monitoring of the integrity of the interventions.<sup>5</sup> A common source of confusion is whether RTI is a general education or special education tool, and its adoption by the IDEA has only muddied the waters. However, RTI is not meant to be used with students who

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<sup>3</sup> See discussion *infra* Part II.C.

<sup>4</sup> Sheri Berkeley et al., *Implementation of Response to Intervention: A Snapshot of Progress*, 42 J. LEARNING DISABILITIES 85, 86 (2009).

<sup>5</sup> *Id.*

already have an identified learning disability, but rather with students who fall short of that standard but still have difficulties learning.<sup>6</sup>

RTI is usually conceptualized as a triangle or pyramid with several tiers. Each tier represents a certain level of educational services. In the bottom tier, students receive universal screenings, and based on those screenings some students will receive targeted interventions, like being assigned to a special reading group, that can be done as part of general education.<sup>7</sup> A smaller number of students who fail to make progress in the first tier will be moved up to the second tier, where they will receive more targeted, small-group interventions.<sup>8</sup> The remaining students who have failed to make progress are in the third tier and receive higher intensity, individualized instruction.<sup>9</sup> Models differ in the percentage of students served by each tier, but the basic model has each tier shrink substantially so that only a small percentage of students are receiving the most intensive instruction.<sup>10</sup> Students can move between tiers, climbing the pyramid while their learning difficulties remain, and remaining in place or even moving to lower tiers as particular educational interventions help mitigate their educational difficulties—that is, as the students “respond” to the interventions. This is the distinguishing characteristic of RTI: As one researcher put it, “RTI is the degree to which a student who has been identified as at risk for academic or behavioral problems and has been provided with intervention *has benefited from the intervention and eliminated or considerably reduced his or her risk status* [for academic or behavioral problems].”<sup>11</sup>

RTI focuses more on the process of providing interventions than on the content of those interventions or the student’s response to them, so this basic framework can be—and is—implemented in very different ways. As one commenter noted in 2006, “[I]t is unclear how consistency between states, districts, schools, and even grade levels will be obtained,” given this diversity of implementation.<sup>12</sup> That concern remains valid today. Even the models themselves are given divergent interpretations, with the tip of the pyramid sometimes corresponding to placement in special education and

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<sup>6</sup> 20 U.S.C. § 1414(b)(6)(B) (2012).

<sup>7</sup> Berkeley et al., *supra* note 4, at 86 (pyramids showing the three RTI tiers often place about 80% of the student population in this bottom, first tier, with about 20% of the student body receiving more intensive RTI services).

<sup>8</sup> *Id.* (this second tier is often said to hold around 15% of the student body).

<sup>9</sup> *Id.* (this third tier is often said to hold around 5% of the student body).

<sup>10</sup> *Id.* at 85–86.

<sup>11</sup> Sylvia Linan-Thompson et al., *The Response to Intervention of English Language Learners at Risk for Reading Problems*, 39 J. LEARNING DISABILITIES 390, 390 (2006) (emphasis added).

<sup>12</sup> Berkeley et al., *supra* note 4, at 94.

sometimes to a less intensive form of individual or even group-based instruction.<sup>13</sup> Additionally, few models have clear requirements for ensuring that schools and teachers are using the same interventions in the same way, further reducing the likelihood of standardization among jurisdictions.<sup>14</sup>

## B. RTI's Place in the IDEA Framework

### 1. Schools' Obligation to Find Children with Disabilities

At its core, the Individuals with Disabilities Education Act says that each student with a disability must receive an "individual education program" (IEP)<sup>15</sup> that provides her a "free appropriate public education"<sup>16</sup> in the least restrictive environment possible.<sup>17</sup> Nearly 13% of all public school children receive some sort of services for disabilities under the IDEA, and many of those students—now more than a third of students with disabilities—receive services for a "specific learning disability" (SLD).<sup>18</sup> An SLD is defined as "a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations."<sup>19</sup> Dyslexia, difficulty processing language, is one example of a specific learning disability.<sup>20</sup>

One key responsibility of schools under the IDEA is determining which children are in need of special education services—a step called "Child Find." Schools have an affirmative obligation to perform Child Find; they cannot simply rely on families to bring children in need of services to their attention.<sup>21</sup> This process is rarely easy, but for students with specific learning

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<sup>13</sup> *Id.* at 91.

<sup>14</sup> *Id.* at 94.

<sup>15</sup> 20 U.S.C. § 1411 (2012); 34 C.F.R. § 300.320–.324 (2015).

<sup>16</sup> 20 U.S.C. § 1401(9) (2012); 34 C.F.R. § 300.17 (2015).

<sup>17</sup> 20 U.S.C. § 1411; 34 C.F.R. § 300.114 (2015).

<sup>18</sup> See, e.g., INSTITUTION OF EDUC. SCI., *Fast Facts: Students with Disabilities*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=64>. (showing that in 2012, 13% of all pre-K through grade 12 public school children in the U.S. received services for disabilities, and 4.8% for specific learning disabilities).

<sup>19</sup> 20 U.S.C. § 1401(30)(A); 34 C.F.R. § 300.8(c)(10)(i) (2015).

<sup>20</sup> 20 U.S.C. § 1401(30)(B); 34 C.F.R. § 300.8(c)(10)(i).

<sup>21</sup> 20 U.S.C. § 1412(a)(3) (2012); 34 C.F.R. § 300.111 (2015). See, e.g., *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245 (2009) ("A reading of the [IDEA] that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services.").

disabilities it can be particularly hard. A student could be struggling in language arts because she has dyslexia, because her teachers are inept, because she is staying up late playing video games and falling asleep at school, because her family has trouble keeping food on the table, or all of the above. A student struggling for one of these latter reasons will still have rights under the IDEA if she also has an SLD, but not if these other problems fully explain her poor performance. Schools performing Child Find must make difficult distinctions, then, and not simply see lack of sleep, for example, and disregard the potential for an SLD. How this “imperfect ability to listen, think, speak, write, spell or do mathematical calculations” is measured and assessed has been the source of controversy since before the creation of the IDEA.<sup>22</sup>

## 2. *Specific Learning Disabilities and the Reauthorization of the IDEA*

Between 1977 and the early 2000s, the number of students identified for SLD services increased 200%.<sup>23</sup> Until 2004, the primary factor in determining whether a child had an SLD was whether the child showed “a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.”<sup>24</sup> “Intellectual ability” usually meant IQ, so this test would look for some discrepancy between the child’s IQ and her performance on a particular achievement test.<sup>25</sup>

This approach has been severely criticized for a number of reasons, including that it favors middle class children with high IQ scores and that it reflects a “wait to fail” model where children are not entitled to services until

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<sup>22</sup> Ruth Colker, *The Learning Disability Mess*, 20 AM. U. J. GENDER SOC. POL’Y & L. 81, 85–96 (2011).

<sup>23</sup> Berkeley et al., *supra* note 4, at 85.

<sup>24</sup> 20 U.S.C. § 1414(b)(6)(A) (2012).

<sup>25</sup> See Colker, *supra* note 22, at 86; Torin D. Togut & Jennifer E. Nix, *The Helter Skelter World of IDEA Eligibility for Specific Learning Disability: The Clash of Response-to-Intervention and Child Find Requirements*, 32 J. NAT’L ASS’N ADMIN. L. JUDICIARY 568, 575 (2012). Debates over racial and cultural bias in evaluation methods have existed well before the codification of the IDEA, but by the 1997 Amendments, the Act itself recognized these concerns, requiring that schools ensure that “assessments and other evaluation materials used to assess children under this section are selected and administered so as not to be discriminatory on a racial or cultural basis” as well as “provided and administered in the language and form most likely to yield accurate information . . .” 20 U.S.C. § 1414(b)(3)(A)(i)–(ii).

after they have already fallen far behind.<sup>26</sup> In addition, schools often have a whole battery of test results from which they can pick and choose, making this process significantly less rigorous and objective than it first appears. A recent example of this type of dispute comes from the case of E.M. in California.<sup>27</sup> In *E.M. ex rel. E.M. v. Pajaro Valley Unified School District Office of Administrative Hearings*, the parties disputed which of three measures should be used as a baseline for determining E.M.'s intellectual ability.<sup>28</sup> The case began in 2004, when E.M. scored 104 on the Wechsler Intelligence Scale for Children (WISC) in a test administered by a private psychologist hired by E.M.'s parents, who then sent E.M.'s school the results and asked that he be evaluated for special education services.<sup>29</sup> In the school's evaluation, E.M. tested 111 on the Kaufman Assessment Battery for Children (K-ABC) and scored a 98 on the Test of Nonverbal Intelligence (TONI), both administered by a school psychologist.<sup>30</sup> At the time, California required a difference of at least 22.5 points between intellectual ability and achievement to constitute a severe discrepancy.<sup>31</sup> The school district chose to use the middle score, 104, as the baseline for intellectual ability and compared it to E.M.'s lowest academic score, an 87 in listening comprehension.<sup>32</sup> The resulting difference of 17 points was deemed too low to qualify as a severe discrepancy, and E.M.'s parents filed suit after he was deemed ineligible for special education services. After nearly a decade of litigation by E.M.'s parents, the Ninth Circuit upheld the school's initial determination as reasonable, emphasizing that the courts "must take care to not substitute [our] own notions of sound educational policy for those of the school authorities we review."<sup>33</sup>

In response to the criticisms of severe discrepancy as a way of determining whether a child has an SLD, the 2004 IDEA amendments added an option allowing schools to "use *a process that determines if the child*

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<sup>26</sup> Colker, *supra* note 22, at 93.

<sup>27</sup> *E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings*, 758 F.3d 1162 (9th Cir. 2014).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1165.

<sup>30</sup> *Id.* at 1165–66.

<sup>31</sup> *Id.* at 1166.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1170 (quoting *K.D. v. Dep't of Educ.*, 665 F.3d 1110, 1117 (9th Cir. 2011)). E.M.'s parents filed a due process complaint and, upon being denied relief, sued in federal court. As the case worked its way through the courts, both E.M.'s parents and the school had his IQ tested in 2007 and found it to be 110 and 114 respectively, at which point the school determined he was eligible for special education. *Id.* at 1166. However, the issue being litigated was whether the initial determination was correct. *Id.* at 1165.

*responds to scientific, research-based intervention*” rather than the “severe discrepancy” approach.<sup>34</sup> Among other cost savings, regulators hoped that this model would save the several thousands of dollars it cost to conduct the average eligibility evaluation.<sup>35</sup>

This “scientific, research-based intervention” language is the only federal statutory language discussing the implementation of RTI. Federal regulations and regulatory guidance do expand upon this language somewhat. These regulations allow schools to use RTI to determine whether a child has an SLD if that child (1) “does not achieve adequately for the child’s age or [does not] meet State-approved grade-level standards” when provided with appropriate instruction for her age or grade level, and then (2) “does not make sufficient progress [to meet those standards] when using a process based on the child’s response to scientific, research-based intervention.”<sup>36</sup> According to the U.S. Department of Education’s Office for Special Education Programs, RTI must include high quality, research-based instruction in general education, universal screening for academic and behavior problems, continuous progress monitoring, and multiple tiers of progressively more intense research-based instruction and intervention.<sup>37</sup>

Despite the relative paucity of federal guidance on how to implement RTI, three different federal statutes provide schools with money that can be used toward implementing RTI programs: (i) the IDEA, (ii) Title I of NCLB, and (iii) Title III of NCLB. Under the IDEA, this money comes out of schools’ “Part B” funds—which in 2014 totaled \$12.8 billion dollars.<sup>38</sup> In general, schools may use up to 15% of the money they receive under IDEA Part B on “early intervening services” for students “who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education

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<sup>34</sup> 20 U.S.C. § 1414(b)(6)(B) (2012) (emphasis added). For a discussion of the creation of the history of IDEA amendments, including the 1997 and 2004 amendments discussed below, see RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT*, 17–43, 81–107 (2013).

<sup>35</sup> COLKER, *supra* note 34, at 103–106. See, e.g., Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity under the IDEA*, 58 HASTINGS L.J. 1147, 1159–62 (2007).

<sup>36</sup> 34 C.F.R. § 300.309(a)(1)–(2) (2015).

<sup>37</sup> Memorandum from Melody Musgrove, Director, Office of Special Education Programs (OSEP) to the State Directors of Special Education (Jan. 21, 2011), <https://www2.ed.gov/policy/speced/guid/idea/memosdcitrs/osep11-07rtimemo.pdf> [hereinafter OSEP Memo 11-07] (explaining that RTI cannot be used to delay-deny an evaluation for eligibility under the IDEA).

<sup>38</sup> CLARE MCCANN, *NEW AM. FOUND., FEDERAL FUNDING FOR STUDENTS WITH DISABILITIES: THE EVOLUTION OF FEDERAL SPECIAL EDUCATION FINANCE IN THE UNITED STATES* 10 (2014), [https://www.newamerica.org/downloads/IDEA\\_6\\_25\\_2014\\_FINAL.pdf](https://www.newamerica.org/downloads/IDEA_6_25_2014_FINAL.pdf).

environment.”<sup>39</sup> Schools that are found to disproportionately identify children for special education, however, *must* use the maximum amount of money for early intervening services “particularly, but not exclusively, [for] children in those groups that were significantly over identified.”<sup>40</sup> This means, for example, that if a school were found to be disproportionately identifying Latino students for special education, the school would need to use the entire 15% allocation on early intervening services.<sup>41</sup> RTI is one way of delivering early intervening services, but it is not the only way. Schools could provide services like additional tutoring for students using the IDEA money without it being part of a formal RTI plan.<sup>42</sup> Schools could use the funds for teacher training or for other types of student interventions.<sup>4344</sup>

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<sup>39</sup> 34 C.F.R. § 300.226(a) (2015) (explaining the IDEA uses slightly different language, “students . . . who *have not been* identified as needing special education or related services . . . .”) (emphasis added). *See also* 20 U.S.C. § 1413(f)(1) (2012) (explaining the regulatory language leaves room for students who had once been but are not currently receiving IDEA services to be part of the pool of students receiving EIS under this money).

<sup>40</sup> 20 U.S.C. § 1418(d)(2)(B) (2012); 34 C.F.R. § 300.320 (2015).

<sup>41</sup> *Id.* (noting that disproportionality deals with race or ethnicity, not ELL-status, though those are often related). In 2004, the IDEA was amended to affirmatively require states to take steps to address and prevent disproportionate representation in special education by ethnic and racial minorities. *See* 20 U.S.C. § 1414(b)(3) (2012) (assessments “not to be discriminatory on a racial or cultural basis”); 20 U.S.C. 1416(a)(3)(C) (2012); 34 C.F.R. §§ 300.173, 300.600(d)(3) (2015) (identification); 20 U.S.C. § 1418(d); 34 C.F.R. § 300.646(b) (2015) (data collection). The implementing regulations require that schools rule out things like cultural factors, environmental or economic disadvantage, or limited English proficiency before determining that a child has a specific learning disability. 34 C.F.R. § 300.309(a)(3)(iv)–(vi) (2015). This, of course, creates a double-edged sword. It helps prevent unnecessary and premature identification for children who may still be learning English as having learning disabilities, but it also serves to delay their evaluation for special education services. *See, e.g., K.A.B. ex rel. Susan B. v. Downingtown Area Sch. Dist.*, No. 11-1158, 2013 WL 3742413, at \*6 (E.D. Pa. July 16, 2013) (citing the school district’s experts’ claims that students from other countries need to be in the U.S. at least two years before special-needs testing). In the *K.A.B.* case, the court mentioned that the child “received extensive 1:1 and small-group instruction in language arts.” *Id.* at \*8. It is not clear whether this was part of an RTI program.

<sup>42</sup> The regulations specifically allow for “professional development” for teachers and staff and for “providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction . . . .” 34 C.F.R. § 300.226(b)(1)–(2) (2015). This “scientifically based” language fits in with the spirit of RTI, but does it does not call specifically for it.

<sup>43</sup> *See, e.g., Ana M. Munson, Federal Funding to Support Response to Intervention, RTI ACTION NETWORK*, <http://www.rtinetwork.org/getstarted/develop/federal-funding-to-support-rti> (last visited Sept. 23, 2015).



Schools do need to be careful to earmark the IDEA Part B funds for later RTI tier interventions or training in special education methods, since initial RTI screenings deal with the entire student population, not only those students who are ultimately found eligible for IDEA services through an RTI process.

Second, Title I, Part A of NCLB provides money to schools that have high numbers of students from low-income families.<sup>45</sup> This money is divided into four statutory formula-determined grants based on each school's number of children in poverty.<sup>46</sup> Over \$14 billion was spent on Title I grants nationally in 2014, though Congress' total appropriations of NCLB funding have long fallen short of authorized funding levels.<sup>47</sup>

Finally, and most importantly for ELLs, Title III of NCLB provides funds for English Language Acquisition programs.<sup>48</sup> The federal government awarded \$723 million in funds for these programs in 2014.<sup>49</sup> These funds could also be used for RTI programs, subject to similar caveats to the use of IDEA funds—that is, that the money needs to be earmarked for the specifically targeted population and not for the general population.

## II. SAILING THE SHOALS OF RTI: PROMISE AND PITFALLS FOR STUDENTS WITH SPECIAL LEARNING NEEDS

Scholars and advocates tend to fall into two camps in their views on RTI: the first camp views RTI as a fishing line, helping sort children by pulling up

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<sup>44</sup> *Id.* (explaining that allowable activities include professional development, i.e., training, for school staff and the provision of “educational and behavioral interventions, including scientifically based literacy instruction.”). See also 34 C.F.R. § 300.226(b) (2015). The regulations also require schools to report to their State Education Agency the number of children who received EIS and the number of those children who “subsequently receive special education and related services under Part B of the [IDEA] during the preceding two year period.” 34 C.F.R. § 300.226(d). This data, presumably, is used to address concerns that EIS are a means of siphoning special education money away from students with disabilities.

<sup>45</sup> 20 U.S.C. § 6311 (2012).

<sup>46</sup> See *Programs: Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A)*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/programs/titleiparta/index.html> (last updated June 4, 2014).

<sup>47</sup> *Atlas: No Child Left Behind*, NEW AM. FOUND., <http://atlas.newamerica.org/no-child-left-behind-overview> (last updated July 2, 2015) (relevant information can be found under the heading “Other NCLB Programs: Title I”). See generally Clare McCann, *No Child Left Behind Funding*, NEW AM. FOUND., <http://www.edcentral.org/edcyclopedia/no-child-left-behind-funding/> (last visited Nov. 23, 2015).

<sup>48</sup> 20 U.S.C. § 6801 (2012).

<sup>49</sup> *Atlas: No Child Left Behind*, *supra* note 47.

those who really need special education services while leaving behind those who do not; the other camp views RTI as a net, providing necessary services to prevent children from falling behind in school and from requiring special education services in the first place.<sup>50</sup> The first view focuses on RTI as a diagnostic tool for special education, but this view also gives credence to the criticism that RTI can drag out this sorting process, rather than fast-track students to appropriate services. The second view focuses on the idea of RTI as a general education intervention for all children, but it also highlights the concerns of some special education advocates that RTI unnecessarily prevents children from receiving special education services.

This Part examines both the benefits and the downsides of RTI by considering it through both of these lenses, focusing on the legal rights of students regarding RTI. This examination shows that despite RTI's use as both a test for special education eligibility and a set of interventions intended to help keep all students from falling behind, the law strongly favors the first view, providing legal claims for students who claim to need special education services and largely ignoring claims for other students. This focus harms those students who believe they are being provided substandard RTI services, but do not believe that they require special education, such as ELLs and other students who would benefit from educational interventions short of special education. The law leaves these students behind in other ways too, as the laws governing ELL education have generally been interpreted as giving schools extremely broad leeway in the services they provide to such students.

### *A. RTI as Fishing Line: Addressing Specific Learning Disabilities*

The first view of RTI treats it as a way to accurately sort students. Ideally, RTI helps schools correctly identify students with learning disabilities while keeping students without those disabilities out of the costly special education system. RTI aims to bring students up to an adequate performance level such that students are never incorrectly identified as having a learning disability when the real problem is inadequate general education.<sup>51</sup> The IDEA amendments specifically consider RTI from this

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<sup>50</sup> These analogies are my own, drawn from the idiom, "A rising tide lifts all boats." Part of the philosophy of RTI seems to be that providing interventions for children in the general education curriculum will serve to benefit more children in the long run without a loss of services for specialized groups.

<sup>51</sup> Linan-Thompson et al., *supra* note 11, at 397 ("Although a daily, year-long intervention may be labor intensive and expensive to provide, it is undoubtedly more cost-effective and, we suggest, more appropriate than incorrectly identifying students for special education.").

perspective, authorizing schools to use RTI as an alternative to the “severe discrepancy” test for determining which children need special education.<sup>52</sup>

Yet RTI as implemented by the IDEA regulations may trap students with specific learning disabilities in a “wait to fail” model. Recall that using RTI as a means of determining SLD-status is premised on a child first failing to achieve adequately for age or grade level standards, then failing to respond to several levels of increasingly intensive interventions.<sup>53</sup> Therefore, to qualify for special education services, a child must first fall short of the school’s standards and then work her way through the school’s RTI system.<sup>54</sup> Thus, RTI may be unnecessarily putting off the day when students receive the special education services they really need.

Other problems with this system are that it fails to capture (i) students who are performing at grade level but should be doing better because of their aptitude and (ii) students who are scoring at grade level because the standards are low (or the instruction poor) to begin with.<sup>55</sup> Advocates of RTI would argue that universal screening should be based on rigorous standards of grade level performance, mitigating the latter fear. However, it is very unlikely that RTI will capture a student who is not performing as well as her aptitude would suggest she should, so long as she is meeting the threshold set by the universal screening.<sup>56</sup>

In the years since the IDEA’s 2004 reauthorization, the number of students classified as having a specific learning disability has declined,<sup>57</sup>

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<sup>52</sup> 20 U.S.C. § 1414(b)(6)(B) (2012).

<sup>53</sup> 34 C.F.R. § 300.309(a)(1)–(2) (2015).

<sup>54</sup> See discussion *infra* Part II.C. (discussing the uncertainty regarding the length of each tier of RTI).

<sup>55</sup> Arguably, the severe discrepancy approach should identify students who meet grade level requirements but whose IQ or other aptitude measures show they should be achieving much higher.

<sup>56</sup> Whether or not special education services are required to bring student performance up to the level a student has the aptitude for is a long-standing and frequently debated question. One of the most famous special education cases, *Board of Education v. Rowley*, suggests in analyzing whether a student has received FAPE that merely passing is good enough for special education. 458 U.S. 176 (1982). See, e.g., COLKER, *supra* note 34, at 62 (“Neither the courts nor Congress has ever overruled *Rowley*, and it is common for hearing officers to conclude that a child has made ‘adequate’ progress even when it is clear that the child is performing significantly below his or her potential.”).

<sup>57</sup> The number of students with specific learning disabilities declined from nearly 2.8 million in 2004–05 (41.6%) down to 2.3 million (36%) in 2011–12, though that number appears to have already been on the decline since a peak in the early 2000s. INSTITUTION OF EDUC. SCI., *Table 204.30*, NAT’L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_204.30.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_204.30.asp) (last visited Sept. 23,

though specific learning disabilities are still the most common classification under the IDEA.<sup>58</sup> Keeping kids out of special education is a goal of RTI, so scholars are rightly concerned that RTI may delay formal classification of a student with a disability under the IDEA.<sup>59</sup> Delay in identification can be especially harmful for students with behavioral issues because being classified as a student with a disability carries protection from suspension or expulsion for actions that are a product of a disability.<sup>60</sup> Students who are receiving RTI, but have not yet been identified under the IDEA, do not have these protections from school disciplinary procedures.<sup>61</sup> Some RTI plans try to address this “protection gap” by including behavioral supports along with academic interventions.<sup>62</sup> These supports, however, do not carry the same legal protections as the IDEA.<sup>63</sup>

### *B. RTI as Safety Net: Supporting ELLs and Other General Education Learners*

The second view of RTI focuses on its capacity to improve outcomes even for students not entitled to full-blown special education services. RTI

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2015) (providing statistics regarding Children 3 to 21 years old served under the IDEA, Part B by type of disability through the years 1976–77 and 2011–12). *See also* Jose L. Martín, *Legal Implications of Response to Intervention and Special Education Identification*, RTI ACTION NETWORK, <http://www.rtinetwork.org/learn/ld/legal-implications-of-response-to-intervention-and-special-education-identification> (last visited Sept. 23, 2015) (citing a 12.4% decline in the number of students with learning disabilities).

<sup>58</sup> Approximately 36% of all students receiving services under the IDEA, Part B in 2011–12 had specific learning disabilities. *See* INSTITUTION OF EDUC. SCI., *supra* note 57; Institute of Education Sciences, *The Condition of Education 2014*, 54–56 (2014), <http://nces.ed.gov/pubs2014/2014083.pdf>.

<sup>59</sup> *See, e.g.*, Togut & Nix, *supra* note 25, at 574–84.

<sup>60</sup> The school must hold a “manifestation determination” meeting to decide whether the behavior subject to discipline was related to a student’s disability and whether the student’s conduct was “the direct result” of the school’s failure to properly implement the student’s IEP. *See* 20 U.S.C. § 1415(k) (2012); 34 C.F.R. § 300.530(e) (2015).

<sup>61</sup> *See* Angela A. Ciolfi & James E. Ryan, *Race and Response-to-Intervention in Special Education*, 54 HOW. L.J. 303, 306 (2011).

<sup>62</sup> *See, e.g.*, California’s “Multi-Tiered System of Supports” framework, which includes “positive behavioral support” as one of its four main components. *MTSS Components: Core Components of California’s Multi-Tiered System of Supports*, CAL. DEP’T OF EDUC., <http://www.cde.ca.gov/ci/cr/ri/mtsscomponents.asp> (last updated July 23, 2015).

<sup>63</sup> *See* 20 U.S.C. § 1415(k); 34 C.F.R. § 300.530(e). *See also* text accompanying note 60.

promises to provide appropriate, scientific, research-based interventions to all students who are falling behind in school, whether or not they have a disability. In other words, this is a *general education* intervention. Nevertheless, RTI may help address two primary special education concerns. The first is a concern that students are being over-identified as having a specific learning disability, when they are not, in fact, learning disabled, but merely need higher quality general education services. The second concern is that minority students are misidentified for special education services—either mislabeled with the wrong disability or mistakenly labeled as having a disability—because of lack of understanding or cultural biases by school staff.

One of the biggest ways in which RTI may help students—even those who ultimately end up with specialized IEPs—is by promoting a culture of inclusion within the general education curriculum.<sup>64</sup> This could have advantages both from normative and human developmental perspectives. From a normative perspective, providing more services within the general education curriculum may reduce the overrepresentation and stigmatization—and de facto segregation—of minorities into special education classrooms.<sup>65</sup> In the area of language development, for example, research has shown that being in a classroom with classmates with strong language skills significantly helps children with disabilities.<sup>66</sup>

Under RTI, students should start receiving some intervention services as soon as a school's universal screening mechanism indicates those students are falling behind. This can be much faster than the process of evaluating a student and formulating an IEP before a school starts providing special education services, which takes at least (under a statutory minimum rarely observed in actual practice) 90 days.<sup>67</sup> Nevertheless, some advocates fear that

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<sup>64</sup> See Czapanskiy, *supra* note 1, at 773–76; Garda, *supra* note 1, at 1081–85, 1097–99.

<sup>65</sup> *Id.*

<sup>66</sup> Laura M. Justice, et al., *Peer Effects in Early Childhood Education: Testing the Assumptions of Special-Education Inclusion*, 25 PSYCHOL. SCI. 1722, 1727–29 (2014).

<sup>67</sup> A school must determine eligibility for special education within 60 days of receiving parental consent for an evaluation. 20 U.S.C. § 1414(a)(1)(C)(i)(I) (2012). Then, the school must convene an IEP meeting within 30 days of determining eligibility and provide services in accordance with the IEP “as soon as possible.” 34 C.F.R. § 300.323(c) (2015). There is little uniformity or strict requirements as to timing of RTI interventions. Federal law is silent on this point. States appear to vary widely on how long each round of intervention will last, from a few weeks to an entire school year. Perry A. Zirkel & Lisa B. Thomas, *State Laws and Guidelines for Implementing RTI*, 43 TEACHING EXCEPTIONAL CHILD. 60, 68 (2010) (chart outlining various state guidelines and procedures for duration of each tier of RTI).

these faster services may come at the cost of withholding the more fully realized suite of special education services provided under the IDEA. School advocates, on the other hand, suggest that many students might be better served outside of special education as more individualized instruction becomes available through RTI.<sup>68</sup>

As Torin D. Togut and Jennifer E. Nix nicely summarize, “RTI has great potential, in theory, to improve the education for students at risk of failure, to reduce the costs of special education by reducing the number of students who need those services, and to reduce the stigma and sometimes low expectations that attach to students found eligible for special education.”<sup>69</sup> In particular, RTI could be a boon to ELL students, who run the risk of being labeled as having an SLD when they are merely in need of appropriate language services.<sup>70</sup> Indeed, the IDEA specifically addresses the issue of properly distinguishing ELL-status from disability.<sup>71</sup> Yet school districts still find that they are sending higher percentages of ELL students than non-ELL students into special education.<sup>72</sup> Take, for example, Boston, where 21% of the city’s ELL students receive special education.<sup>73</sup> The district is now being monitored by the Department of Justice, and has entered into a series of agreements with the DOJ to provide it with continuing data on Boston’s ELL programs.<sup>74</sup>

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<sup>68</sup> See Martin, *supra* note 57 (“Does the 35-year-old definition of ‘specially designed instruction’ require modernization as a broader and deeper range of instructional intervention options becomes available within regular education? This question will likely be fodder for upcoming legislative discussion when IDEA is again reauthorized in a timeframe fully within the RTI era. As a broader range of struggling students’ needs can be met outside of the special education system, IDEA might evolve to reflect this reality by updating its definition of special education services. Perhaps this debate will also lead to reform in child-find and referral rules, in recognition of schools’ local intellectual and resources investments in high-quality intervention programs.”).

<sup>69</sup> Togut & Nix, *supra* note 25, at 577.

<sup>70</sup> See, e.g., Linan-Thompson et al., *supra* note 11, at 391.

<sup>71</sup> 20 U.S.C. § 1418(a)(1)(A) (2012) (requiring reporting on number and percentage of children with disabilities who have limited English proficiency status); 20 U.S.C. § 1418(d) (addressing disproportionality).

<sup>72</sup> For a discussion of discrepancy in referrals to special education, see Erin Archerd, *An IDEA for Improving English Language Learners’ Access to Education*, 41 FORDHAM URB. L.J. 351, 369 (2013).

<sup>73</sup> Erin Smith & Erica Moura, *Barrier Grief: English Issues Mistaken for Learning Disabilities in Boston Schools*, BOS. HERALD (July 21, 2014), [http://www.bostonherald.com/news\\_opinion/local\\_coverage/2014/07/barrier\\_grief\\_englis\\_h\\_issues\\_mistaken\\_for\\_learning\\_disabilities](http://www.bostonherald.com/news_opinion/local_coverage/2014/07/barrier_grief_englis_h_issues_mistaken_for_learning_disabilities).

<sup>74</sup> Successor Settlement Agreement Between The United States of America and The Boston Public Schools, U.S. DEP’T OF JUST. (Apr. 19, 2012), <http://www.justice.gov/crt/>

Scholars have argued that properly implemented RTI can serve to reduce this disproportionality by better addressing the needs of culturally and linguistically diverse students.<sup>75</sup> San Diego Unified School District, for example, implemented a series of pre-referral interventions specifically for ELLs after a 2007 study found that Latino English learners were 70% more likely to be identified for special education services than their Latino non-English learner peers.<sup>76</sup>

Still, there are no federal rules dictating the content of RTI, or guidelines as to what RTI for ELLs should look like. The IDEA calls for special education evaluations to be conducted in “the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally.”<sup>77</sup> RTI, however, does not necessarily call for native-language or language-adapted assessments, and with universal screening being the typical practice, schools might not want to invest in special RTI screening assessments for their ELL students. Further, measuring ELL students’ performance once they are in an intervention can be difficult because student performance is often compared against a norm group, and those norm groups often do not include ELLs.<sup>78</sup> Moreover, ELLs may need more time to build and solidify skills, and thus might need more

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about/edu/documents/bostonsuccessoragree.pdf; Settlement Agreement Between The United States of America and The Boston Public Schools, U.S. DEP’T OF JUST. (Sept. 30, 2010), <http://www.justice.gov/crt/about/edu/documents/bostonsettle.pdf>.

<sup>75</sup> See, e.g., Mary Beth Klotz, *RTI and Disproportionate Representation in Special Education*, 37 COMMUNIQUE 17 (2008); Sylvia Linan-Thompson et al., *Determining English Language Learners’ Response to Intervention: Questions and Some Answers*, 30 LEARNING DISABILITY Q. 185 (2007); Ciolfi & Ryan, *supra* note 61; Garda, *supra* note 1.

<sup>76</sup> Angela Gaviria & Timothy Tipton, *CEP-EL: A Comprehensive Evaluation Process for English Learners*, SAN DIEGO COUNTY OFF. OF EDUC. (2012), <http://www.sdcoe.net/lls/english-learner/Documents/Comprehensive%20Evaluation%20Process%20for%20ELs%20Hano ut%201%20of%202.pdf>.

<sup>77</sup> Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446 § 614(b)(3)(A)(ii), 118 Stat. 2647 (codified as amended in scattered sections of 20 U.S.C.); 34 C.F.R. § 300.304(c)(1) (2015). This is an expansion from the previous version of the statute, which required only that evaluations be “provide and administered in the child’s native language or other mode of communication, unless it is clearly not feasible to do so.” Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17 § 614(b)(3)(A)(ii), 111 Stat. 37 (codified as amended in scattered sections of 20 U.S.C.).

<sup>78</sup> Linan-Thompson et al., *supra* note 75, at 187. The ELL students in the Linan-Thompson study also scored on average more than two standard deviations below the norm in their initial testing and so few met the performance goals despite intensive interventions. *Id.* at 192.

intensive interventions in areas like reading.<sup>79</sup> This may be all the more critical to consider if the goal of RTI is accurately separating students who need special education from those who do not.<sup>80</sup>

*C. The Uncertain Shores of RTI: Variable Implementation and Lack of Case Law*

Under either of these two views of RTI, as a fishing line pulling the proper students toward special education or a safety net improving the services of all students in general curriculum, the greatest potential harm of RTI is that it will lead to lengthy interventions that do not work, either for a particular student or for a large group of students. Legal recourse, however, does not focus on the potential harm, but rather on the identity of the student or students making the claim. For the individual student, it seems that only a student with disabilities has a clear pathway out of RTI and toward other individualized educational services.<sup>81</sup> For other categories of students, like ELLs, there may be some hope of bringing a class-action lawsuit or filing a state or federal complaint against a school, but it is still unlikely that that a group of ELLs would be successful in such a lawsuit.<sup>82</sup>

One of the main problems with making any definitive pronouncements about RTI as a policy is that its actual use and effects are wreathed in uncertainty. With little uniformity in how schools and districts implement RTI, it is difficult to discuss and analyze a standard for legally inadequate RTI procedures. A small number of education law scholars have begun to look at how RTI is being implemented to see whether, and how, states are using RTI after the 2004 IDEA amendments. For example, in 2010, Perry A. Zirkel and Lisa B. Thomas found that most states were still using both RTI

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<sup>79</sup> *Id.* at 193. Rather than a longer time period in an intervention, “more time” could come in the form of “a longer instructional day, or grouping and instructional practices that provide students more opportunities to actively use English, or it could be an extended school year.” *Id.*

<sup>80</sup> As Sylvia Linan-Thompson, and her co-authors Sharon Vaughn and Paul T. Cirino explain, “It is important to consider that when it comes to RTI, the focus is on individual students meeting criteria and ensuring that they will continue to profit from general education reading instruction without additional intervention or referral for special education. This contrasts with studies that examine the effectiveness of the intervention overall, in which the performance of the treatment group is compared with the control providing evidence about what works but not evidence of whether it resolves all further difficulties in reading for a given student. This is a critical distinction when decisions are made about identification and eligibility for special education.” *Id.* at 193.

<sup>81</sup> See discussion *infra* Part II.E.

<sup>82</sup> See discussion of ELL case law *infra* Part II.E.



and severe discrepancy approaches in identifying students with SLDs—leaving the choice of which to use to local schools.<sup>83</sup> Zirkel and Thomas attempted to categorize RTI schemes by the way they are enacted or implemented by a state, for example whether the RTI policies are enacted by a state education code versus suggested as a good practice by the state board of education. Most states, however, simply did not address more specific requirements, like the duration of, or number of, interventions at each tier; and those that did address such requirements showed a “lack of stringency and uniformity.”<sup>84</sup> Ultimately, however, the authors were not troubled by this lack of codification, as they favored guidelines, which they saw as easier to change in response to changes in RTI methods, affording “the state a spectrum of forcefulness” and giving “ample flexibility for districts to customize their particular form of RTI to their local school culture.”<sup>85</sup>

Despite the nebulous implementations of RTI, one can make some generalizations about the legal rights afforded students under RTI programs. One clear conclusion from the case law is that the legal hook for a student’s claim will differ significantly depending on whether the student is seeking placement in special education or not. Where the plaintiff claims a need for special education, she is entitled to various procedural rights under the IDEA, including a multi-step dispute resolution process and an administrative or judicial determination of her status. But where a plaintiff alleges that RTI is inadequate without a corresponding claim for special education, then her avenues for legal recourse are less clear—and significantly less promising. In the sections that follow, I will discuss each student’s legal options in greater detail.

#### *D. Special Education: RTI and Child Find Disputes*

Parents who feel that their child is being denied special education services have recourse to a number of legal options, including complaints to state or federal regulatory bodies, as well as what are known as “due process claims”—essentially, administrative hearings.<sup>86</sup> A parent who believes that her child needs special education services can ask the child’s school to evaluate the child. The school must then either evaluate the child or explain in writing why they will not do so. If the child is evaluated and found to have

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<sup>83</sup> Zirkel & Thomas, *supra* note 67, at 60–61 (referencing their own research and David W. Walker & David Daves, *Response to Intervention and the Courts: Litigation-Based Guidance*, 21 J. DISABILITY POL. STUD. 40 (2010)).

<sup>84</sup> *Id.* at 67.

<sup>85</sup> *Id.* at 68.

<sup>86</sup> Archerd, *supra* note 72, at 369.

a disability, the school must work with her parents to develop and approve an individualized education plan (IEP) for that child.

If parents and schools disagree at any point, either can file a due process claim.<sup>87</sup> Such claims are adjudicated by a hearing officer, using hearing procedures largely determined by the state.<sup>88</sup> Once the due process route has been exhausted, parties wishing to appeal their verdicts can then file in federal court.<sup>89</sup>

In addition to these options, a series of alternative dispute resolution mechanisms are available to resolve disputes about special education. The states themselves first introduced these mechanisms into their special education processes.<sup>90</sup> In 1997, Congress began formalizing these procedures, adding a requirement that states offer mediation upon the filing of a due process complaint.<sup>91</sup> The 2004 reauthorization of the IDEA went further, mandating that states provide a series of pre-due-process-hearing dispute resolution procedures.<sup>92</sup>

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<sup>87</sup> 20 U.S.C. § 1415 (2012). Both families and schools can file for a due process hearing. A parent, for example, might file a due process complaint if he believes that some necessary service for his child is not being offered by the school as part of his child's education plan. A school might file a due process complaint if a parent is refusing to allow her child to be evaluated for special education services and the school believes the student needs to be receiving them. *See id.*

<sup>88</sup> *Id.* For one look at how states structure their special education hearing officer systems, see Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 3, n.7 (2011). For a discussion of different state approaches to due process hearings, see Symposium, *The Ohio State University Dispute Resolution in Special Education*, 30 OHIO ST. J. ON DISP. RESOL. 89 (2014).

<sup>89</sup> See Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 349 (2009).

<sup>90</sup> See Memorandum from Melody Musgrove, Director, Office of Special Education Programs (OSEP) to Chief State School Officers and State Directors of Special Education (July 23, 2013), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf> [hereinafter OSEP Memo 13-08] (Question A-2 discusses historical context for the mediation provisions in the IDEA and the relevant regulations).

<sup>91</sup> Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified as amended in scattered sections of 20 U.S.C.) (establishing the new mediation procedures in § 615(e)).

<sup>92</sup> The statute sought to expand the use of dispute resolution procedures nationwide, saying, "Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways." 20 U.S.C. § 1400(c)(8) (2012).

Now, even before a parent files a due process complaint, she has the option of mediating her dispute with the school.<sup>93</sup> After she files a complaint, she must participate in a “resolution session” with school officials unless both the parent and school officials agree to waive the resolution session.<sup>94</sup> Only after these dispute resolution options have been exhausted (or waived) does the due process complaint go to a hearing officer for decision, and only after that may the parent take the dispute to federal court.<sup>95</sup> In addition, many states and individual school districts have developed other forms of dispute resolution, particularly focusing on addressing disputes before a due process complaint is filed (commonly called “upstream” solutions).<sup>96</sup>

This framework applies regardless of whether schools use RTI or the “severe discrepancy” model of identifying children with specific learning disabilities. A parent who thinks that RTI is serving only to put off the school’s special education obligations can request a mediation with the school or file a due process claim, just like a parent who thinks that the school misapplied the “severe discrepancy” model.

The case law regarding schools’ RTI obligations is limited and the scope of parents’ substantive rights to challenge RTI is still unclear. The United States Supreme Court has yet to accept a case involving RTI, and only the Ninth Circuit has decided an appeal involving schools’ substantive obligations with regard to RTI.<sup>97</sup> Moreover, many of the lower court decisions involving intervention services do not deal with an RTI plan, but rather some other form of intervention.<sup>98</sup> In these cases, the courts have shown significant deference to schools’ choices, particularly if it appears students are making some progress in whatever intervention they are

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<sup>93</sup> *Id.*

<sup>94</sup> 20 U.S.C. § 1415(f)(1)(B) (2012).

<sup>95</sup> However, these dispute resolution procedures cannot be used to delay a parent’s right to a due process hearing. 20 U.S.C. § 1415(e)(2)(A)(ii). For the due process hearings, some states have one-tier systems where a due process complaint is only adjudicated by a hearing officer, while other states have a two-tier system where there is an additional level of review by a second officer before the claim can be brought in federal court. 20 U.S.C. § 1415(f)–(g); 34 C.F.R. § 300.514 (2015). For a more detailed look at how hearing officers are utilized throughout the country, see Zirkel, *supra* note 88, at 9–42.

<sup>96</sup> The Center for Appropriate Dispute Resolution (CADRE)—a center funded by OSEP—has created a continuum model in which it arranges interventions from prevention (e.g., parent engagement) to legal review (e.g., litigation). See *CADRE Continuum of Dispute Resolution Processes and Practices*, CADRE, <http://www.directionservice.org/cadre/continuumnav.cfm> (last visited Sept. 23, 2015).

<sup>97</sup> *Michael P. v. Dep’t of Educ. of Haw.*, 656 F.3d 1057, 1068 (9th Cir. 2010); *M.M. ex rel. C.M. v. Lafayette Sch. Dist.*, 767 F.3d 842 (9th Cir. 2014).

<sup>98</sup> *Id.*

receiving. For example, courts have found that a school's use of pre-RTI intervention services was appropriate under the IDEA where the student—later found to have a learning disability—was evaluated for special education services once he stopped making progress in his intervention;<sup>99</sup> that a school satisfied its Child Find obligations where a student made progress in response to additional educational assistance from his teacher, even though the student was later diagnosed with a “non-verbal learning disorder”;<sup>100</sup> and that the IDEA does not require that a student's behavioral intervention plan include any “specific substantive requirements.”<sup>101</sup> The events in question in these cases occurred before the 2004 amendments incorporated RTI into the IDEA, but they offer a glimpse into how courts are likely to evaluate substantive challenges to RTI programs under that statute. If schools have some intervention plan in place and students are making progress under it, courts are unlikely to find that schools are in violation of the IDEA for

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<sup>99</sup> *Daniel P. v. Downingtown Area Sch. Dist.*, No. 07-0463, 2011 WL 4572024 (E.D. Pa. Oct. 3, 2011). The student, Daniel, had been receiving services predating the school's formal RTI plan. *Id.* at \*1. Daniel's parents challenged these services as a denial of the free appropriate public education Daniel should have received as a student with a disability. *Id.* at \*1–2. The District Court ultimately agreed with a special education appeals panel that the interventions were appropriate because Daniel was evaluated for special education once he failed to make progress in his educational interventions. *Id.* at \*4–6. His expert, Dr. Margaret Kay, asserted that, “a true RTI intervention process would have likely been extremely effective for Daniel P. had it been implemented in Kindergarten as intended, [but] the core characteristics of Pennsylvania's RTI model were never implemented by the Downingtown Area School District in this case.” *Id.* at \*4. However, on that very same page of her report, Dr. Kay conceded that, “the core characteristics of Pennsylvania's RTI model did not exist when Daniel was in kindergarten, first or second grades.” *Id.* Note that in some states, there is a two-tier process for deciding due process complaints, starting with a due process hearing officer's decision, which can then be appealed to a special education panel. *See Zirkel, supra* note 88, at 3.

<sup>100</sup> *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 226 (D. Conn. 2008). The court also found that the use of pre-referral “Child Study Teams” who concluded that the student could be accommodated “as a regular education student” in the 5<sup>th</sup> grade was allowable under the IDEA and that his parents did not need to be included in those team meetings as they would have been included in an IEP meeting. *Id.* at 227–30.

<sup>101</sup> *T.W. ex rel. McCullough v. Unified Sch. Dist. No. 259*, 136 F. App'x 122, 129 (10th Cir. 2005). Two subsequent federal court cases have cited *T.W.* for the proposition that courts defer to schools on behavioral interventions. *See Waukee Community Sch. Dist. v. Douglas L.* No. 4:07-cv-00278-REL-CFB, 2008 WL 9374268, at \*9 (S.D. Iowa Aug. 7, 2008); *Mr. and Mrs. C. ex rel. K.C. v. Maine Sch. Admin. Dist. No. 6*, No. 06-198-P-H, 2007 WL 4206166, at \*22, n.30 (D. Me. Nov. 28, 2007).

failing to identify a student as having a learning disability, even if the student is later found to have a disability.

Two decisions from the Ninth Circuit address other aspects of RTI. First, the 2010 decision in *Michael P. v. Department of Education* held that the Hawaii Department of Education violated the IDEA by forbidding the state's schools from using RTI, mandating the "severe discrepancy" approach instead.<sup>102</sup> This seems to be a relatively straightforward reading of the IDEA, which says that a "local education agency may use" RTI.<sup>103</sup> Second, the recent case of *M.M. ex rel. C.M. v. Lafayette School District* addressed the issue of how schools have to treat RTI data in evaluating students for special education.<sup>104</sup> In this case, C.M.'s parents claimed that his school violated the IDEA by neither sharing his RTI data with them nor using that data in developing C.M.'s initial IEP.<sup>105</sup> The District Court had rejected that claim, concluding that schools must disclose RTI data to parents only when RTI is used to determine whether a child has a learning disability, while the school district here had based its disability determination on the "severe discrepancy" model.<sup>106</sup> However, the Ninth Circuit partially reversed the lower court.<sup>107</sup> The panel found that while C.M.'s school did not need to use the RTI data in its evaluation for eligibility, it did need to make sure that the "RTI data was documented and carefully considered by the entire IEP team"—including C.M.'s parents—when determining what services to

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<sup>102</sup> *Michael P.*, 656 F.3d at 1068.

<sup>103</sup> 20 U.S.C. § 1414(b)(6)(B) (2012) (emphasis added).

<sup>104</sup> *M.M. ex rel. C.M. v. Lafayette Sch. Dist.*, 767 F.3d 842 (9th Cir. 2014). C.M. received Tier 1 and Tier 2 RTI services during kindergarten, according to his district's new RTI model. *Id.* at 847–48. C.M.'s school conducted a special education assessment in April of his first grade year and drew up an IEP for him. *Id.* at 848. The following year, his parents had an independent evaluation of C.M. that showed he had a central auditory processing disorder, which the school failed to reflect in C.M.'s next IEP, despite requests by his parents. *Id.* His parents then requested that the school pay for a new independent educational evaluation, but the school refused and eventually filed a due process complaint to have a hearing officer rule that the school could reassess C.M. itself. *Id.* at 849–50, 856. The hearing officer ruled for C.M.'s parents but found the school only had to pay half the cost of the outside evaluation because the parents had waited so long to request it. *Id.* at 857–58. C.M.'s parents filed a series of due process claims alleging failure to provide FAPE for second and third grades, including an argument that the school erred (i) in not considering C.M.'s RTI data in developing his IEP and (ii) in not providing C.M.'s parents with all of his RTI data at this initial IEP meeting, thus denying them the ability to meaningfully participate in developing his IEP. *Id.* at 850.

<sup>105</sup> *Id.* at 852–53.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 851.

provide C.M. in his IEP.<sup>108</sup> This decision acknowledged that determining eligibility for services and forming an IEP are two different steps. Schools *may* use RTI data to determine eligibility for special education, but they *must* use RTI data, if available, in developing a student's IEP. Furthermore, the Court confirmed that schools have a procedural duty to share RTI data with parents in order to get their consent for initial eligibility evaluations.<sup>109</sup>

Nevertheless, in a school with RTI or similar intervention programs, the onus is on parents to request a special education evaluation for their child if they feel the intervention may be delaying special education services. The main issue in these cases is *when* schools must evaluate a child—that is, how long a school may give its intervention process to work before individually evaluating the child. As noted above, one common concern is that RTI establishes a “wait to fail” model, allowing schools to avoid, or at least put off, providing the services required by the IDEA.<sup>110</sup> In a 2010 article examining RTI litigation, David W. Walker and David Daves focus on the case of *El Paso Independent School District v. Richard R.*<sup>111</sup> In that case, Richard's parents asked the school district to evaluate him for special education services.<sup>112</sup> The school delayed, waiting almost 13 months to evaluate Richard, because he was receiving other interventions at the time.<sup>113</sup> Richard's parents filed a due process complaint, claiming that the school had failed its obligations under the IDEA.<sup>114</sup> They prevailed, first before the state special education hearing officer, and then before the federal District Court.<sup>115</sup> In ruling, the court adopted guidance from other courts finding that

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<sup>108</sup> *Id.* at 853. It appears the school's psychologist had told the school to attach the RTI information to the IEP evaluation materials, but they were never attached so C.M.'s parents never saw that information in his initial IEP meeting. *Id.* at 853–54.

<sup>109</sup> *Id.* at 855. In his dissent, Judge Rawlinson argued that the hearing officer's report showed that RTI was only used for classroom assignments and not at all as an assessment for special education eligibility. *Id.* at 863–64 (Rawlinson, J., dissenting). Because RTI was not used as an assessment, Judge Rawlinson felt the school had no obligation to provide C.M.'s parents with copies of RTI data either when getting their consent for C.M.'s initial evaluation or at his IEP meeting. *Id.*

<sup>110</sup> See discussion in Part I.B.2.

<sup>111</sup> Walker & Daves, *supra* note 83, at 42; *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918 (W.D. Tex. 2008).

<sup>112</sup> *El Paso Indep. Sch. Dist.*, 567 F. Supp. 2d at 923.

<sup>113</sup> *Id.* at 952. Though the court did not specifically rule on this point, Walker and Daves classify the school's “Student Teacher Assessment Team (STAT)” as a type of RTI. See Walker & Daves, *supra* note 83, at 42.

<sup>114</sup> *El Paso Indep. Sch. Dist.*, 567 F. Supp. 2d at 922–23.

<sup>115</sup> *Id.* at 923–24. The court cites the hearing officer's finding that the district “violated the time lines for an initial evaluation because the matter was repeatedly referred to the STAT committee. It's clear that the STAT committee was set up to provide

## RESPONSE TO INTERVENTION

6- and 12-month delays in determining eligibility for special education violated the IDEA.<sup>116</sup> Walker and Daves use their analysis of this case to suggest that schools “complete their RTI process in less than 6 months.”<sup>117</sup>

So far the courts have been unwilling to say much about pre-referral interventions in special education cases. What they have said seems to give schools substantial leeway to use whatever RTI method they feel is

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a student support and intervention before a special education referral is made. However, in practice, the [c]ommittee is merely an obstacle to parents who want to access the special education referrals . . . [the IDEA] gives the parent a right to seek an evaluation and overrides local district policy concerning intervening procedures.” *Id.* at 941.

<sup>116</sup> *Id.* at 951–52.

<sup>117</sup> Walker & Daves, *supra* note 83, at 43. From a special education procedural process perspective, perhaps the more interesting legal outcome of *El Paso Independent School District* came from the subsequent litigation over whether Richard’s parents could recover attorney fees since they had prevailed in the District Court. *See El Paso Indep. Sch. Dist. v. Richard R.*, 599 F. Supp. 2d 759 (W.D. Tex. 2008); *El Paso Indep. Sch. Dist. v. Richard R.*, 591 F.3d. 417 (5th Cir. 2009). The District Court had awarded attorney fees in the amount of \$45,804, but the Fifth Circuit decided that because Richard’s family had rejected a written settlement offer that offered the educational relief he eventually was awarded and reasonable attorney’s fees that his parents had “unreasonably protracted the resolution of this dispute.” *El Paso Indep. Sch. Dist.*, 591 F.3d. at 419. The written settlement offer was faxed by the school after the statutorily required resolution meeting ended without an agreement between the parties. *Id.* at 420. *See* 20 U.S.C. § 1415(f)(1)(B) (2012). It appears the debate was over the nature of the settlement agreement. Richard R.’s attorney was pushing for an agreed order, which would have had the force of a court behind it, while the school district would only agree to the typical private settlement, which would have had to go through the IDEA due process hearing route if breached, rather than be directly enforceable in state or federal court. *Id.* at 420–21. However, the Fifth Circuit reasoned that the IDEA requires settlements arising from resolution meetings would be “enforceable in any State court . . . or in district court of the United States,” and concluded that, “a settlement agreement reached at the resolution meeting would have been enforceable in federal court.” *Id.* at 426 (citing 20 U.S.C. § 1415(f)(1)(B)(iii)(II)). The Fifth Circuit then vacated the award of attorney’s fees. *Id.* at 430. In its reasoning, the Court pointed out several scenarios in which IDEA provisions “contemplate reducing the attorney’s fee award of a part that ultimately prevails in an administrative or judicial proceeding,” including when a prevailing party “achieves no more than what was earlier offered in settlement” and when the prevailing party is “found to have unreasonably protracted the litigation.” *Id.* at 423 (citing 20 U.S.C. §§ 1415(i)(3)(D)(i); 1415(i)(3)(F)(i)). The Court went on to point out that attorney’s fees are available for work done prior to the written offer of settlement. *Id.* at 424. Since the IDEA due process hearing timeline requires parties to sit down within weeks of filing a claim to discuss settlement, with disputes lasting for months and years as the case moves first through administrative hearings and then federal courts, the amount of legal work that happens prior to a written settlement offer is usually a small percentage of the total number of hours spent on a special education case.

appropriate, so long as potential special education students are still eventually evaluated for disabilities. At most, schools must conduct special education evaluations requested by parents in a timely manner and provide parents with any data gathered about their child during RTI programs when the parents and IEP team are considering special education services for their child.

Federal regulatory guidance has attempted to address parent advocates' concerns about RTI as a "wait to fail" system.<sup>118</sup> In 2011, the Department of Education's Office of Special Education Programs issued a memorandum clarifying its interpretation of permissible uses of RTI and obligations regarding it.<sup>119</sup> Importantly, this memorandum emphasized that schools cannot take a "wait and see" approach toward identifying students as needing special education, even for students currently receiving RTI.<sup>120</sup> If a parent requests a special education evaluation, then the school must either conduct it within 60 days (or less if required by the State),<sup>121</sup> or else provide a statutorily-required written notice explaining why it refuses to conduct an evaluation.<sup>122</sup> A school cannot refuse to conduct an evaluation simply to see how the child responds to RTI.<sup>123</sup> For example, if a school's RTI process required students to spend 8 weeks receiving Tier 1 interventions and 8 weeks receiving Tier 2 interventions, the school could not tell parents that it would evaluate their child after he had completed the first two tiers of intervention. This approach is consistent with that of the Department of Education's Office for Civil Rights, responsible for Section 504 of the Rehabilitation Act of 1973, which deals with services for persons with disabilities, including students in schools.<sup>124</sup> The Office for Civil Rights has found that Section 504 obligations can be triggered while a student is

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<sup>118</sup> See OSEP Memo 11-07, *supra* note 37 (citing 34 C.F.R. § 300.301(c)).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 2. ("The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation.").

<sup>121</sup> See *id.* (citing 34 C.F.R. § 300.301(c)).

<sup>122</sup> *Id.* (citing 34 C.F.R. § 300.503(a)(2)).

<sup>123</sup> "It would be inconsistent with the evaluation provisions at 34 C.F.R. §§ 300.301 through 300.111 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework." *Id.*

<sup>124</sup> Section 504 of the Rehabilitation Act of 1973 prevents disability discrimination by organizations that receive federal funding. 29 U.S.C. § 794(b)(2)(B) (2012) (including local education agencies as covered under the Act).



receiving RTI<sup>125</sup> and that receiving RTI does not justify a delay or denial of an evaluation under Section 504.<sup>126</sup>

Though the exact contours of this area of law are still being litigated, parents who think their children need special education services have a clear path forward. They can avail themselves of the procedural and substantive rights provided by the IDEA, using formal or informal dispute resolution processes to ensure that their children are provided the free, appropriate education guaranteed by law. As we will see in the next section, however, students in the general education population have significantly fewer options.

*E. Everyone Else: General Education Students (including ELLs) Left with Fewer Options*

All of the case law above specifically considers educational interventions in the context of the IDEA, but students only have recourse to the IDEA if they are seeking special education services. Otherwise, these students are not entitled to either the procedural rights (like mediation or due process hearings) or the substantive protections (like individual education programs) that the IDEA provides. Students in the general education population have few opportunities to challenge their schools as providing inadequate or inappropriate educational services. Some state constitutions provide specific rights to education, which can lead to challenges to school practices under state law.<sup>127</sup> The federal No Child Left Behind Act allows student-specific remedies, like additional tutoring, for parents whose children are in failing schools, but the statute provides for no individual cause of action.<sup>128</sup>

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<sup>125</sup> Polk County (FL) Public Schools, 56 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 179 (OCR 2010).

<sup>126</sup> Harrison (CO) School District Two, 57 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 295 (OCR 2011).

<sup>127</sup> See, e.g., New Jersey's "thorough and efficient" education clause. N.J. CONST. art. 8, § 4, ¶ 1; Abbott *ex rel.* Abbott v. Burke, 20 A.3d 1018 (N.J. 2011). This state-based possibility may bear fruit in the RTI context, as some states have prescribed specific steps that must be taken as part of an RTI program, though no states have codified RTI methods specifically for ELLs into their state education laws. Some states have issued guidance about RTI and ELLs. See, e.g., ILL. ADMIN. CODE tit. 23, § 226.130 (2015) (implementing RTI through its special education regulations). Illinois, however, also provides "non-regulatory guidance" to schools on implementing RTI with ELLs. See generally ILL. STATE BD. OF EDUC., ILLINOIS SPECIAL EDUCATION ELIGIBILITY AND ENTITLEMENT PROCEDURES AND CRITERIA WITHIN A RESPONSE TO INTERVENTION (RTI) FRAMEWORK (2012), [http://www.isbe.net/spec-ed/pdfs/sped\\_rti\\_framework.pdf](http://www.isbe.net/spec-ed/pdfs/sped_rti_framework.pdf).

<sup>128</sup> See *Horne v. Flores*, 557 U.S. 433, 456, n.6 (2009).

This creates a situation where a student's options for raising complaints about her school's RTI program differ dramatically based on whether she claims to need special education services. If she does, then she is entitled to pre- and post-complaint mediation, an administrative hearing, and access to the federal courts under a reasonably strict standard.<sup>129</sup> Moreover, she also has some opportunity to opt out of the RTI system and move straight to the individualized assessment required under the IDEA. If this student does not claim a need for special education, however, she is entitled to none of these options.

This divergence is particularly concerning for English language learners (ELLs), who by some measures are already disproportionately identified as requiring special education.<sup>130</sup> Parents of ELLs may be less knowledgeable about the relevant laws, less able to navigate their district's bureaucracy, or simply less willing (for any number of reasons) to threaten or initiate legal action against their child's school.<sup>131</sup> This group may be more likely than most to benefit from appropriate RTI services, yet, if they do not put their claims in the "magic" words of suspected disability, they lose the benefit of the IDEA's significant protections.

ELLs, however, have it better than most non-special-education students, as they have rights under several other legal frameworks, including No Child Left Behind<sup>132</sup> and the Equal Educational Opportunities Act.<sup>133</sup> These laws, however, appear unlikely to provide much help for an ELL student unhappy with her school's RTI program. Title III of NCLB is the English Language Acquisition Act, which provides grants to states for providing educational services to ELL (or "Limited English Proficient" per NCLB) students, with no stipulations regarding the particular methodology or type of services used.<sup>134</sup> This, coupled with the fact that there is no private right of action under NCLB, makes it unlikely to be a source of either procedural or substantive remedies for students who believe they are receiving inappropriate RTI services.

The federal statute that deals most directly with ELLs' educational needs, the Equal Educational Opportunities Act (EEOA), says that "[n]o

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<sup>129</sup> See discussion *supra* Part II.C.

<sup>130</sup> For instance, the Boston public schools had general concerns with disproportionality. See *supra* notes 73–74 and accompanying text.

<sup>131</sup> See Archerd, *supra* note 72, at 369–80.

<sup>132</sup> See 20 U.S.C. § 6301 (2012).

<sup>133</sup> See 20 U.S.C. § 1701 (2012).

<sup>134</sup> 20 U.S.C. § 6812 (2012). The English Language Acquisition Act (ELAA) was a successor to the Bilingual Education Act. See Archerd, *supra* note 72, at 370; Eden Davis, *Unhappy Parents of Limited English Proficiency Students: What Can They Really Do?*, 35 J.L. & EDUC. 277, 279 (2006).

State shall deny equal educational opportunity to an *individual* on account of his or her race, color, sex, or national origin, by . . . *the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation* by its students in its instructional programs.”<sup>135</sup> The EEOA arose during the same era as the IDEA, as part of an upswelling of civil rights organizing.<sup>136</sup> Its passage in 1974 followed the seminal Supreme Court decision in *Lau v. Nichols*, which held that San Francisco’s failure to teach English to non-English speaking Chinese students violated the Civil Rights Act of 1964.<sup>137</sup> An RTI program that does not appropriately address an ELL student’s language learning needs arguably violates the EEOA because that student is being denied equal education opportunity by his school’s failure to overcome language barriers that impede his equal participation in school instructional programs.

The controlling standard for evaluating EEOA claims is *Castaneda v. Pickard*, in which the Fifth Circuit held that programs for ELLs must: (i) be informed by sound education theory or legitimate experimental strategy, (ii) be reasonably calculated to implement the theory effectively, and (iii) produce results indicating that language barriers are being overcome.<sup>138</sup> This three-prong test has become the *de facto* measure of programs for ELLs under federal law, having been adopted by the Office of Civil Rights in its enforcement of Title VI of the Civil Rights Act.<sup>139</sup>

The *Castaneda* test shows some parallels to the principles of RTI. The first prong of the test calls for educational services for ELLs to be “informed by sound education theory or legitimate experimental strategy,” which is similar to the research-based requirements for RTI programs. The third prong

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<sup>135</sup> 20 U.S.C. § 1703 (2012) (emphasis added). On the other hand, it is worth noting that the hook is still race or national origin, not language status. Courts apply this to both Title VI of the Civil Rights Act and the EEOA. For Title VI, see *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 795 (8th Cir. 2010) (“A policy that treats students with limited English proficiency differently than other students in the district does not facially discriminate based on national origin.”). See also *K.A.B. ex rel. Susan B. v. Downingtown Area Sch. Dist.*, No. 11-1158, 2013 WL 3742413, at \*12 (E.D. Pa. July 16, 2013) (using *Mumid* to argue that there was “no evidence . . . that the District has failed to take appropriate action *on account of* national origin” to deny an EEOA claim) (emphasis in original).

<sup>136</sup> For more on the history of ELL-related litigation, see Archerd, *supra* note 72, at 365–71.

<sup>137</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>138</sup> *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981).

<sup>139</sup> Memorandum from Michael L. Williams, Assistant Sec’y for Civ. Rights, to OCR Senior Staff, *Policy Update on Schools’ Obligations Toward National Origin Minority Students with Limited-English Proficiency* (Sept. 27, 1991), <http://www2.ed.gov/about/offices/list/ocr/docs/lau1991.html>.

of the test calls for “results indicating language barriers are being overcome,” which suggests that some sort of tracking and progress monitoring should be taking place to make sure that programs are producing results.<sup>140</sup>

Nevertheless, the *Castaneda* test is unlikely to provide ELLs with an effective avenue for improving their schools’ RTI programs. While RTI plans do provide a potential source of information about what kinds of services children are receiving, this data may do parents little good if schools are only compelled to provide it when parents claim their child should be eligible for special education.<sup>141</sup> Even if ELLs have access to RTI data—say, for instance, in a suit alleging failure to provide equal education opportunity under the EEOA—courts are likely to continue to be reluctant to second guess the services schools are providing. The most recent Supreme Court case dealing with the EEOA, *Horne v. Flores*, cited *Castaneda* to emphasize that, “Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.”<sup>142</sup> This “wide latitude” called for by the Supreme Court is unlikely to make a lawsuit under the EEOA an attractive way for an individual student to seek changes to her educational services.

The deference afforded to schools in applying the *Castaneda* standard makes it difficult to show that a program for ELLs is legally deficient.<sup>143</sup> The easiest type of EEOA case to prove alleges an outright denial of language services, rather than challenging their adequacy. Recently, the ACLU brought just such a case, alleging that several California school districts are not providing sufficient access to English language instructional services.<sup>144</sup>

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<sup>140</sup> Scholars have suggested that these two prongs of the test deserve more empirical attention. See, e.g., Eric Hass & Mileidis Gort, *Demanding More: Legal Standards and Best Practices for English Language Learners*, 32 BILINGUAL RES. J. 115, 117 (2009).

<sup>141</sup> See discussion of the C.M. case, *supra* notes 104–09 and accompanying text.

<sup>142</sup> *Horne v. Flores*, 557 U.S. 433, 440–41 (2009) (quoting *Castaneda v. Pickard*, 68 F.2d at 1009).

<sup>143</sup> See, e.g., *McFadden v. Bd. of Educ. Ill. Sch. Dist. U-46*, 984 F. Supp. 2d 882, 894 (N.D. Ill. 2013) (finding no EEOA violation and citing *Horne v. Flores* for the position that schools should be given “a substantial amount of latitude” in implementing ELL programs).

<sup>144</sup> A copy of the filing in Los Angeles Superior Court can be found here: Petition for Writ of Mandate, D.J. *ex rel.* E.A. v. California, No. BS142775 (Cal. Super. Ct. May 28, 2014), <http://www.scribd.com/doc/153228069/Petition-for-Writ-of-Mandate/>. Much of the initial controversy appears to have been generated when the California Department of Education changed the way districts were supposed to send it information about what kinds of services ELLs were receiving. Tens of thousands of ELLs were marked as not receiving any services.

## RESPONSE TO INTERVENTION

The DOJ's Educational Opportunities Division filed a Statement of Interest in the case as it went to trial, supporting the ACLU's position.<sup>145</sup> In August 2014, the district judge issued a tentative writ of mandamus, compelling the California Department of Education to "perform ministerial acts" to ensure that school districts are serving all ELLs in need of services.<sup>146</sup> In particular, the court required the state to: (i) monitor whether the districts are providing EL instructional services to their EL students; (ii) confirm that EL programs meet the three-prong *Castaneda* test; and (iii) "promulgate guidelines to ensure that school districts are clear on their duties under the EEOA and are addressing their EL students' language needs."<sup>147</sup> Though this case did not directly involve the use of RTI, the court's order did focus on the need for instructional services tailored for ELLs and better training for teachers who work with ELLs—both features that would easily fit within an RTI program.<sup>148</sup> At the very least, it seems like the EEOA might still have some teeth in encouraging schools to provide targeted programs for ELLs that are researched-based and produce results for ELL students. On the other hand, this lawsuit was brought by the ACLU on behalf of a class of students throughout the state of California. Such impact litigation does not provide accessible recourse for the individual student.

For parents who feel there are systemic abuses of or inadequacies with their schools' RTI programs, the regulatory option may be the strongest recourse currently available, with greater enforcement offered by regulatory

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<sup>145</sup> Statement of Interest by the United States of America, D.J. *ex rel.* E.A. v. California (2014) (No. BS142775), <https://www.aclusocal.org/wp-content/uploads/2014/07/US-SOI-Filed-07-14-2014.pdf>.

<sup>146</sup> Tentative Decision on Petition for Writ of Mandate, D.J. *ex rel.* E.A. v. California, No. BS142775 (Cal. Super. Ct. 2014), <https://www.aclusocal.org/wp-content/uploads/2014/08/Tentative-Decision-on-Petition-for-Writ-of-Mandate-Granted.pdf>.

<sup>147</sup> *Id.* at 33–34.

<sup>148</sup> *See id.* at 7. In California, these students are called English Learners (ELs). *Id.* at 2. The court cited a study that found "more than half of California teachers with 26–50% of their students designated as ELs had either zero or one in-service training session devoted to the instruction of EL students over a period of five years." *Id.* at 7. Intriguingly, the court found that the main plaintiff, D.J., lacked standing since she had never been classified as "Initial Fluent English Proficient" and never required ELL instructional services. *Id.* at 25. It came to similar conclusions about several other student plaintiffs. *See id.* at 25–28. The court went into a lengthy discussion of public interest standing doctrine in California, finding that "Respondents alleged failure to comply with their duties to EL students is a matter of public duty under the State Constitution and EEOA. The public has a strong interest in ensuring that school districts follow their duty to provide EL services." *Id.* at 29.

agencies like the Department of Justice or the Department of Education.<sup>149</sup> For instance, parents of ELLs can consider filing a complaint with the Office of Civil Rights (OCR), requesting an investigation for discrimination under Title VI of the Civil Rights Act.<sup>150</sup> OCR is unlikely to make a school district change its program outright, but agencies may take notice once a disproportionate percentage of ELLs start showing up in special education programs.<sup>151</sup> Again, this option lacks the kind of individual procedures available under the IDEA.

In short, while parents of ELLs who feel their children are not receiving adequate education services have more options than parents whose children are not part of a specially protected category under civil rights laws, they (along with the rest of the general education population) do not have access to anything approaching the procedural and substantive rights available to students claiming a need for special education services under the IDEA. This is a problem, because all students placed in RTI could benefit from improved interventions, just as they could all end up being placed in special education if the school's interventions fail. To create this distinction based solely on whether the student claims an entitlement to special education services—not just whether the student *is* entitled to those services, but whether she *claims* to be—is illogical and harmful to those children who are least able to effectively navigate this process. In the next Part, I propose a way to ameliorate this disparity.

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<sup>149</sup> For an example of the Department of Justice stepping in to ensure that class registration and school discipline procedures were enforced for ELLs in compliance with the EEOA and Title IV of the Civil Rights Act, see Press Release, Dep't of Justice, *Justice Department Reaches Settlement with School District of Palm Beach County, Fla., to Prevent and Address Discrimination in School Enrollment and Student Discipline* (Feb. 26, 2013), <http://www.justice.gov/opa/pr/justice-department-reaches-settlement-school-district-palm-beach-county-fla-prevent-and>. See also Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement* 86 NOTRE DAME L. REV. 1413, 1480 (2011) (critiquing the ability of the Department of Education Office for Civil Rights to effect changes in district policies).

<sup>150</sup> Davis, *supra* note 134, at 282 (“Even if the program fails, the OCR is wary to find a Title VI violation because of this consideration of the school district’s discretion.”).

<sup>151</sup> See discussion of Boston and the DOJ *supra* notes 73–74 and accompanying text. Davis points out that parents can also sue schools under Title VI if they believe a school is intentionally discriminating against ELLs, such as employing a method that “includes prolonged segregation of the LEP students from the rest of their classmates,” but concludes that the discriminatory intent (rather than disparate impact) analysis and the fact that most ELL education programs allow parents to opt out would make allegations difficult to prove. See Davis, *supra* note 134, at 284.

### III. EXPANDING ADR TO DEAL WITH ALL RTI DISPUTES

There are now two distinct legal pathways for students who feel their RTI services are inappropriate. Students who claim a need for special education can exercise their rights under the IDEA. Everyone else, including ELLs, must pursue a different, much weaker, set of legal claims. ELLs, at least, unlike students who fall into no particular protected category, have recourse to laws like the Civil Rights Act or the Equal Education Opportunities Act, but claims under these statutes are rarely worthwhile on an individual level, given their long time frames and uncertain chance of success.<sup>152</sup>

One approach to alleviating this disparity would be to expand the sort of individualized education plans offered to students with disabilities into the general education curriculum. Robert Garda, for instance, argues that RTI should be made mandatory as a first step toward moving away from our current special education model by limiting the definition of who is disabled, while providing more individualized services within general education.<sup>153</sup> This approach is politically infeasible, however.<sup>154</sup> Moreover, unless coupled with a substantial increase in budgets, this approach might also result in a watering-down of services for special education students, whose families have historically been strong self-advocates.<sup>155</sup>

A more modest approach, however, is worth considering. Even without granting the IDEA's substantive rights to non-special-education students, extending some of the statute's *procedural* rights to those students would have significant benefits. As dispute resolution has grown with the encouragement of the IDEA, so too has a corps of mediators trained to help parents and schools communicate more effectively with one another. In this Part, I argue that schools should voluntarily enlist their mediation services to deal with any and all RTI complaints, not just those claiming entitlement to special education. Moreover, such a use of mediation arguably falls within the scope of the IDEA. This approach would not require new legislation and would not require schools to significantly change their procedures. Rather,

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<sup>152</sup> See Archerd *supra* note 72, at 365.

<sup>153</sup> Garda, *supra* note 1, at 1129. Garda's particular concern was the disproportionate identification of African-American children for special education services. See generally *id.* at 1075–95.

<sup>154</sup> For more on this conundrum in the expansion and normalization of special education services, see Pasachoff, *supra* note 149, at 1435–50; Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171 (2005).

<sup>155</sup> Pasachoff, *supra* note 149, at 1435–37.

this modest expansion of existing programs would be much easier—and cheaper—to implement at a state and local level than trying to create an ADR process for dealing with RTI disputes whole cloth. Just as the states were at the forefront of providing ADR procedures for special education disputes, they should open up those alternative dispute resolution procedures to all students receiving RTI, even without a federal mandate to do so.

### *A. Mediation, Families, and Schools*

Students who are eligible (or believe they are eligible) for special education services may avail themselves of a host of dispute resolution procedures under the IDEA.<sup>156</sup> Families who have disputes with their schools about IDEA matters are entitled to mediation at the school's expense, even if no due process complaint is ever filed.<sup>157</sup> Mediation, in which a third party neutral sits down with families and schools to help them come to an agreement about special education services, rests upon one of the bedrock principles of special education—that parents have a say in their child's education.<sup>158</sup> A process like mediation allows schools and families to talk about an individual child's education in ways that are meant to be productive but non-adversarial, or at least less adversarial than filing a due process claim or lawsuit. It emphasizes the shared values that families and schools have with respect to educating children, and gives parents an opportunity to voice concerns and gain a better understanding of the education their children receive.

Not only did recent IDEA amendments incorporate RTI into the Act, they also significantly revised the way in which disputes about IDEA services are resolved. In order to encourage settlement prior to a due process hearing, Congress, in 1997, required that states make mediation available *as an option* once a due process complaint is filed.<sup>159</sup> In 2004, Congress added a *required* resolution session between families and schools when a due process complaint is filed.<sup>160</sup> Unlike a mediation, this resolution session need only include family and school representatives, though some districts do provide

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<sup>156</sup> Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended in scattered sections of 20 U.S.C.).

<sup>157</sup> 20 U.S.C. § 1415 (2012); 34 C.F.R. § 300.506 (2015).

<sup>158</sup> 34 C.F.R. § 300.300 (2015). Parents must give their consent at numerous points in the special education process, such as when their child is evaluated for services and when an education plan is created for their child.

<sup>159</sup> Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified as amended in scattered sections of 20 U.S.C.).

<sup>160</sup> 20 U.S.C. § 1415.



third party neutral facilitators to lead the meetings.<sup>161</sup> The 2004 amendments also saw the addition of mediation *as an option* at a party's request at any time, even before a due process complaint is filed.<sup>162</sup> At any point mediation is used, the state is responsible for providing and paying for mediators.<sup>163</sup> I focus in this Article on expanding the mediation process in part because it is available to parents under the IDEA before they file a due process complaint and in part because it is more focused on collaborative problem solving than a resolution session, which is held as a necessary first step to a due process hearing.<sup>164</sup> I also prefer mediation's procedural protections to those offered by the resolution sessions under the IDEA. Mediation, by definition, requires an impartial neutral third party to facilitate discussions, while the statute does not require resolution sessions to be facilitated.<sup>165</sup> Resolution sessions also discourage attorney participation.<sup>166</sup> Finally, mediation is confidential, which may be especially valuable for families who are discussing sensitive family matters.<sup>167</sup>

The growth in special education ADR procedures has created a group of trained individuals with specific expertise in mediating special education disputes and facilitating discussions about special education issues.<sup>168</sup> These ADR professionals are uniquely suited to sit down with families and schools to guide discussions about individualized educational services. Current federal guidance suggests that these sessions are limited to disputes under the

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<sup>161</sup> Archerd, *supra* note 72, at 376, n. 110.

<sup>162</sup> 20 U.S.C. § 1415.

<sup>163</sup> *Id.*

<sup>164</sup> See *supra* Part II. Once a due process complaint is filed, parents and schools must both agree to mediate, while the resolution session is mandatory, unless waived by both parties.

<sup>165</sup> Special education mediators under the IDEA must also be trained in effective mediation techniques and knowledgeable in laws and regulations relating to the provision of special education and related services. 34 C.F.R. § 300.506 (2015).

<sup>166</sup> The resolution session is structured such that if parents do not bring an attorney, schools cannot bring an attorney, but that is less necessary for school officials who have more experience in these kinds of discussions relative to parents. 20 U.S.C. § 1415.

<sup>167</sup> These sensitive matters, for example, could include the legal status of children or other family members.

<sup>168</sup> This includes a federally funded research organization, The National Center on Dispute Resolution in Special Education/Center for Appropriate Dispute Resolution in Special Education (CADRE), which serves as a clearinghouse for information and training in special education-related ADR procedures. NAT'L CTR. ON DISPUTE RESOLUTION IN SPECIAL EDUC., <http://www.directionservice.org/cadre/> (last visited Sept. 23, 2015).

IDEA and its regulations.<sup>169</sup> Practically speaking, however, parties can and do bring up other educational services concerns in the mediation room. For example, it would be a natural extension of a discussion about IDEA special education services to address Section 504 of the Rehabilitation Act of 1973, which prohibits disability discrimination by programs receiving federal financial assistance.<sup>170</sup> This may mean the school and parents would discuss items like visual aids or assistive technology for a student, even if such items are covered under the Rehabilitation Act and not the IDEA.<sup>171</sup>

There are many benefits to using mediation. Some are based on principles of efficiency, as mediation is less costly than litigation in terms of both time to settlement and money expended.<sup>172</sup> Others are based on interpersonal concerns, emphasizing that mediation allows for greater self-determination and collaboration by parties and seeks to preserve the relationships among parties.<sup>173</sup> A 2014 study by Donna Shestowsky found that mediation was preferable to non-binding arbitration and as popular as a judicial trial when parties were faced with civil litigation.<sup>174</sup> They preferred mediation or having their attorneys negotiate with the parties present equally with a judicial trial and more than all other adjudicative procedures, suggesting that parties value informal dispute resolution procedures in which they have the option to participate in decision-making.<sup>175</sup>

Ideally, mediation and other ADR processes would allow schools and parents to settle disputes and provide appropriate services for children with fewer procedural delays,<sup>176</sup> and it would do so by improving communication

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<sup>169</sup> OSEP Memo 13-08, *supra* note 90 (“The mediation process offers an opportunity for parents and public agencies to resolve disputes about any matter under 34 C.F.R. part 300 [i.e., IDEA regulations], including matters arising prior to the filing of a due process complaint.”).

<sup>170</sup> 29 U.S.C. § 794 (2012); 34 C.F.R. § 104.34 (2015).

<sup>171</sup> *Id.* Students can receive aids and services under Section 504 without ever receiving services under the IDEA. 34 C.F.R. § 104.33(b)(2) (2015) (an IEP is not the only means of meeting the appropriate education requirement under the Act, but is merely “one means” of meeting the appropriate education standard).

<sup>172</sup> See, e.g., Jacqueline Nolan-Haley, *Mediation: The “New Arbitration,”* 17 HARV. NEGOT. L. REV. 61, 69–71 (2012); Sharon Press, *Court-Connected Mediation and Minorities: A Report Card*, 39 CAP. U. L. REV. 819, 824–25 (2011).

<sup>173</sup> *Id.*

<sup>174</sup> Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 675 (2014).

<sup>175</sup> *Id.*

<sup>176</sup> Under the IDEA, a resolution session must be convened within 15 days of parents’ filing a due process complaint. 20 U.S.C. § 1415(f)(B)(i)(I) (2012). A mediation must be convened within 15 days of the parents’ complaint. 20 U.S.C. § 1415(f)(B)(ii) (“If the local educational agency has not resolved the complaint to the satisfaction of the

and relationships in the years to come.<sup>177</sup> Educational agencies that make the decision to implement RTI, be it on a local or state level, are making a commitment to provide a more intensive education for their struggling students, and often include RTI as one part of a more comprehensive “Multi-Tier System of Supports” plan that includes parental involvement.<sup>178</sup> Mediation would fit within the kind of support structures envisioned by such plans.

Some may question the utility of extending ADR procedures to parties who still lack any substantive rights to back them up. If parents cannot sue in the event they are not satisfied with the outcome—or have little chance of success if they do<sup>179</sup>—why extend the procedures at all? ADR is not simply a cheaper way to enforce legal rights, however. Mediation and other dispute resolution processes may save schools money by preventing lawsuits by parent or advocacy groups, but financial savings alone is a poor reason for schools to make their mediation procedures more broadly available. Instead, schools should expand mediation because doing so would serve the same goals that schools’ RTI programs are meant to accomplish. RTI is about improving student performance through inclusion, and inclusion requires giving students’ families a voice in communications between parents and schools. Indeed, one of the biggest benefits of processes like mediation may be its power to provide parties with a sense of procedural justice and voice.<sup>180</sup>

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parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.”).

<sup>177</sup> See Chris Guthrie & James Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 889–94 (1998).

<sup>178</sup> See, e.g., COL. DEP’T OF EDUC., *Response to Intervention*, <http://www.cde.state.co.us/rti> (last visited Sept. 23, 2015); CAL. DEP’T OF EDUC., *Definition of MTSS*, <http://www.cde.ca.gov/ci/cr/ri/mtsscompmti2.asp> (last visited Sept. 23, 2015); NAT’L ASS’N OF STATE DIRS. OF SPECIAL EDUC., *Multi-Tier System of Supports* (MTSS), <http://www.nasdse.org/Projects/MultiTierSystemofSupportsMTSS/tabid/411/Default.aspx> (last visited Sept. 23, 2015).

<sup>179</sup> Parents of ELLs would have a colorable claim that a school, which has an RTI program that does not address ELL-specific learning needs, was not appropriately based on sound educational theory under the EEOA.

<sup>180</sup> Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 580–82 (2004) (explaining that parents in special education mediations valued the opportunity to express their views, the assurance their views have been heard, and evenhanded, dignified treatment, while schools valued the ability to hear parents’ concerns and also having parents hear and accept the norms school officials typically apply).

This need for voice is especially important for families who are not members of the dominant culture. Voice, of course, is not the same as power. Power imbalances do exist in mediations between schools and families, but mediators are trained to address these issues while facilitating discussions.<sup>181</sup>

### B. *ELLs and Mediation: A Safe Space*

Expanding mediation alone will not erase the differences between students claiming rights under the IDEA and those who are not. Though mediation can be effective and helpful even in the absence of substantive legal rights, I do not mean to discount the importance of substantive rights.<sup>182</sup> Even with mediation, students and families may get better or worse results based on factors outside their control.<sup>183</sup> Families may be more comfortable with mediators who share some aspect of their identity, but ADR as a field still struggles to produce professionals who are racially and ethnically diverse.<sup>184</sup> Many scholars, myself included, are concerned that wealthier, better educated families receive better outcomes for their children when

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<sup>181</sup> See Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 668–73 (2002).

<sup>182</sup> More than three decades ago Judge Harry T. Edwards reflected on this tension in his Harvard Law Review commentary. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986) (“We must also be concerned lest ADR becomes a tool for diminishing the judicial development of legal rights for the disadvantaged.”). Judge Edwards cited special education mediation as a positive example of community values and the rule of law coming together to address issues “best revolved by parents and educators—not courts.” *Id.* at 682. His opinion is reflective of how courts today treat education disputes. Judge Edwards also felt that having the ultimate resort to adjudication was essential in parent-school mediation. *Id.*

<sup>183</sup> There is debate in the ADR community as to whether (and to what degree) mediators ought to be concerned with the outcomes reached in mediation so long as their role in the process conforms with principles such as mediator neutrality. See, e.g., Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87, 91 (2004) (arguing that power imbalances and issues of equality and justice can be addressed in mediation).

<sup>184</sup> See Lorig Charkoudian & Ellen Kabcenell Wayne, *Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants’ Perception of Mediation*, 28 CONFLICT RESOL. Q. 23, 43 (2010) (finding greater effects on a party’s experience based on gender of the mediator, but stronger negative effects when either gender or race of the mediator was different from that of one party and the same as the opposing party); Maria R. Volpe et al., *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field*, 35 FORDHAM URB. L.J. 119, 122 (2008).

negotiating with schools.<sup>185</sup> Some feel that the right response is to make the dispute resolution process less private and individualized and more public, with a greater emphasis on regulatory intervention.<sup>186</sup> Addressing and alleviating concerns in an individual discussion does not address more systemic level concerns, and I do not want to discount the value of intervention by federal agencies as a tool for students, particularly minority students who have access to protections under federal civil rights law.

Similarly, mediators need to be deliberate and thoughtful in their training and practice to ensure that they properly address cultural differences. Alternative dispute resolution in general has long been criticized for its focus on process and alleged blindness to cultural differences among parties.<sup>187</sup> Scholars worry that processes like mediation promote—or at least cloak—discrimination. Isabelle Gunning outlines two main strains of concern: first, the psychology of prejudice critique (articulated by Richard Delgado, among others) suggests that the informal atmosphere of mediation is fertile ground for deep-seated negative attitudes to influence outcomes; second, the “pro rights” critique points out that rights, rather than compromise, are more important for those who have less power in the larger society, and an adversarial courtroom provides a better forum for exercising rights.<sup>188</sup> She ultimately advocates taking the time to explore the power of negative cultural myths in training mediators, encouraging mediators to use a broad range of interpretive frameworks, and to identify or create shared values, such as equality, among parties during mediation.<sup>189</sup> Similarly, Bob Baruch Bush and Joseph Folger have advocated a renewed focus on “party-centered practices”

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<sup>185</sup> See, e.g., Czapanskiy, *supra* note 1, at 786–89; Archerd, *supra* note 72, at 379; Pasachoff, *supra* note 149, at 1426–35; Caruso, *supra* note 154, at 180–82.

<sup>186</sup> See Pasachoff, *supra* note 149, at 1464.

<sup>187</sup> For an excellent book discussing this, see KEVIN AVRUCH, *CULTURE AND PRETEXT IN CONFLICT RESOLUTION: CULTURE, IDENTITY, POWER, AND PRACTICE* (2012). Avruch describes a few different frameworks that “culture” is typically placed into (i) “norms, values, beliefs;” (ii) perceptual orientations; and (iii) cognitive representations (e.g., schemas). *Id.* at 65. Avruch also discusses the bridging (or at least drawing closer together) of conflict resolution and peace-making as fields and mediation’s place in those fields. *See id.* at 97–123. For a broad discussion of mediation and social justice concerns, see Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 6–10 (2012) (outlining privatization and informalism concerns surrounding the mediation process).

<sup>188</sup> Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 58–62 (1995); Press, *supra* note 172, at 825–34 (outlining the “minority critique” of mediation).

<sup>189</sup> Gunning, *supra* note 188, at 93.

that emphasize party self-determination and human dialogue to address concerns that mediation impairs social justice goals.<sup>190</sup>

More recent examinations of the potential for harm to parties from discrimination in mediation tend toward the psychology critique, using the framework of social cognition and implicit bias.<sup>191</sup> Implicit bias suggests that a person's actions may be motivated by cognitions over which she has no conscious, intentional control, rather than motivated by her overt, conscious prejudice.<sup>192</sup> In the mediation context, there is a concern that a mediator's neutrality may be affected by her implicit biases, leading her to make judgments based on these biases and influencing how she conducts the mediation.<sup>193</sup> Carol Izumi suggests a number of "external" checks on mediator neutrality such as maximizing party control, reinforcing narratives in the parties' own words, using co-mediator teams to "leverage differences and similarities," as well as "internal" checks such as mediators receiving training in bias reduction, exposing mediators to people unlike themselves, and practices such as mindfulness meditation.<sup>194</sup>

These critiques of mediation can—and ought to be—lessened with proper awareness and training.<sup>195</sup> Schools that decide to extend mediation services to all students receiving RTI services should embrace the potential

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<sup>190</sup> Bush & Folger, *supra* note 187, at 49–50.

<sup>191</sup> See, e.g., Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71 (2010).

<sup>192</sup> *Id.* at 86 (citing Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 954–55 (2006)).

<sup>193</sup> See Izumi, *supra* note 191, at 121.

<sup>194</sup> *Id.* at 140–52.

<sup>195</sup> Serious concerns exist as to whether members of the non-dominant culture have the requisite power and authority to negotiate just outcomes for themselves in processes like mediation. While most mediation training programs do provide some training in areas like balance of power and cultural inclusiveness, I have argued, and will continue to argue, that more attention needs to be paid not only to training, but also to empirical research to determine whether certain groups (such as minority women) are receiving substantively worse outcomes in mediation. The Capital University Law Review published a symposium issue in 2011 devoted to questions of race in ADR. Of particular note for questions of program design, see Floyd D. Weatherspoon, *The Impact of the Growth and Use of ADR Processes on Minority Communities, Individual Rights, and Neutrals*, 39 CAP. U. L. REV. 789, 793 (2011) (reviewing prior work on ADR outcomes); Bobby Marzine Harges, *Disaster Mediation Programs—Ensuring Fairness and Quality for Minority Participants*, 39 CAP. U. L. REV. 893 (2011) (discussing flaws in post-disaster insurance mediation programs); Janice Tudy-Jackson, *"Non-Traditional" Approaches to ADR Processes that Engage African-American Communities and African-American ADR Professionals*, 39 CAP. U. L. REV. 921 (2011) (exploring the different contexts for African Americans in relation to ADR and arguing for a paradigm shift toward more proactive and organizational coaching approaches).

mediation has to improve communication between schools and parents, and be mindful of designing their mediations in ways that promote shared values while still allowing parties to tell their stories. Moreover, schools should consider ways to address the imbalance of access to information by connecting parents with resources like parent groups or parent advocates to help parents prepare for and participate in conversations with schools.<sup>196</sup> I am not arguing that mediation is something that should be entered into lightheartedly or incautiously, but expanding mediation provides non-special-education students with more options, and a greater ability to improve their educational outcomes than the current system. This would benefit both students and their schools. If families think their children do not need special education services, but still question the interventions their children are receiving under RTI, then schools should provide them with the option of sitting down and talking with school officials in a safe and structured environment.

*C. The Rising Tide or Leaky Boat: Reaching Out to All Students Receiving RTI Services*

RTI is both special education and general education, both the fishing line that pulls students up through its tiers into a classification as learning disabled, and also the safety net for all learners who are struggling.<sup>197</sup> Federal law considers RTI largely under the former view, as an extension of IDEA Child Find. In that sense, then, all complaints about a school's RTI procedures are complaints about IDEA compliance, and so the IDEA's dispute resolution services should be available to any student who claims a deficiency in her RTI program.<sup>198</sup> By embracing this notion of the fishing line, and extending its logic to open up dispute resolution procedures to all children—with or without disabilities—who are receiving inadequate RTI, we end up making RTI into a better safety net for all struggling students.

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<sup>196</sup> See Archerd, *supra* note 72, at 389. See also Harges *supra* note 195, at 914–17 (arguing for education of minorities regarding disaster relief programs and encouraging the use of legal representatives and/or claim adjusters to assist minority claimants during disaster relief mediations). While I am not suggesting here that parent advocates need to be lawyers, schools will almost certainly have some sort of legal counsel even if there counsel is not at a particular meeting. ADR proponents go back and forth as to value of lawyer and/or non-lawyer advocates in ADR processes. See Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 *FORDHAM URB. L.J.* 381, 409–11 (2010).

<sup>197</sup> See discussion *supra* Part II.

<sup>198</sup> See discussion of federal case law *supra* Part II.D.

As discussed above, schools' use of RTI has grown because they can employ it as a screening mechanism for special education services. Some students will move on from RTI to a full-blown individualized education plan. I am not arguing that any student receiving RTI is a student with a disability or that a student receiving RTI should get an independent education plan like a student with a disability would. But, at the very least, any school that is using RTI to identify students entitled to special education should extend the same school-level procedural right to mediation to all students with concerns about their RTI services. This would allow the school to best explain the kinds of services being offered under its RTI plan, would allow parents and families more input into the education of their children, and would stave off the need for civil rights lawsuits and federal agency intervention that can result when school districts appear to be ignoring the educational needs of groups of minority students.

### CONCLUSION

The question of whether and how much the states should codify RTI is an important one, and worth looking at in future research. State education statutes and regulations are particularly unstable at present, as states move to—or back away from—the Common Core standards.<sup>199</sup> Like the Common Core, RTI is an area in which states could work together to impose greater uniformity. Togut and Nix, for example, argue that greater uniformity is needed. They propose reaching this greater uniformity in part by dropping the “severe discrepancy” test altogether.<sup>200</sup> They also argue that courts need to be more consistent in their standards for Child Find, which would clarify that schools could both use RTI and evaluate children for IDEA services simultaneously.<sup>201</sup> Calls for greater emphasis on individualized education models for all students are also well worth listening to, though the passage of nearly a decade since the incorporation of RTI into the IDEA seems to have done little to blur the line between special and general education.

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<sup>199</sup> The Common Core standards have currently been adopted in 42 states. COMMON CORE STATE STANDARDS INITIATIVE, *Standards in Your State*, <http://www.corestandards.org/standards-in-your-state/> (last visited Sept. 23, 2015). However, some states have begun to drop out of the Common Core, or distance themselves from the standards and, in particular, assessments meant to be used by multiple states. See, e.g., Valerie Strauss, *Two More States Pull Out of Common Core*, WASH. POST (June 5, 2014), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/06/05/two-more-states-pull-out-of-common-core/> (discussing Indiana, Oklahoma, and South Carolina's repeal of the Common Core).

<sup>200</sup> Togut & Nix, *supra* note 25, at 608–09.

<sup>201</sup> *Id.* at 609. For a discussion of Child Find, see *supra* Part I.B.1.



## RESPONSE TO INTERVENTION

To these arguments I would add the proposition that states should also make their special education, pre-due-process-hearing mediation services available to *all* families who have concerns about the RTI processes being used with their children. Our public schools are growing more heterogeneous by the day. Statutes like the IDEA recognize that one-size-fits-all approaches will not work for students with disabilities, yet approaches like RTI ironically seem to threaten a return to generic, en masse educational interventions in lieu of the individualized plans called for by the IDEA. One way to address this is to provide a dispute resolution procedure that encourages individual level conversations between schools and the families of students receiving RTI services, to embrace the best of both the individual and general aspects of the RTI model. Schools can easily expand their mediation models to encompass a broader range of conversations between families and schools, and the expansion of RTI provides a ready port from which to launch such an ADR program.

